

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

Applicant : Nai-Kong V. CHEUNG
U.S. Serial No. : 10/621,027
Filed : July 16, 2003
Confirmation No.: 2089
Examiner : Eric Olson
Art Unit : 1623
For : THERAPY-ENHANCING GLUCAN

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March 10, 2009

Commissioner for Patents
P.O. Box 1450
Alexandria, VA 22313-1450

Sir:

REQUEST FOR RECONSIDERATION OF PATENT TERM ADJUSTMENT

The above-identified application will be issued as U.S. Patent No. 7,507,724 on March 24, 2009. Applicant submits herein a request for reconsideration of patent term adjustment under 37 CFR §1.705(b).

In a decision on the Application for Patent Term Adjustment mailed February 2, 2009 from the Office of Petitions, it was indicated that the November 25, 2008 application for patent term adjustment under 37 CFR §1.705(b) was held in abeyance because at the time the application was filed, there was no exact patent issue date to calculate the exact number of days of delay. Subsequently, Applicant is given two (2) months from the

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issue date of the patent to file without fee a request for reconsideration of the patent term adjustment. Accordingly, Applicant submits that this request for reconsideration is being timely filed.

Statement of Facts

The Correct Patent Term Adjustment

Applicant submits that the correct patent term adjustment should be 104 days as a result of:

USPTO delay under 37 CFR § 1.702(a)(1) - 92 days

USPTO delay under 37 CFR § 1.702(b) - 466 days

Applicant delay under 37 CFR § 1.704 - 454 days

A. USPTO Delay Under 37 CFR § 1.702(a)(1)

The USPTO has failed to mail a notification under 35 U.S.C. 132 not later than fourteen months after the date when the requirements of 35 U.S.C. 371 were fulfilled. Thus, a period of adjustment of patent term due to examination delay starts from the day after the date that is fourteen months after the date on which the requirements of 35 U.S.C. 371 were fulfilled (i.e. September 17, 2004) and ends on the date of mailing of an action under 35 U.S.C. 132 (i.e. December 17, 2004), totaling 92 days.

B. USPTO Delay Under 37 CFR § 1.702(b)

The USPTO has failed to issue a patent within three years after the date on which the national stage commenced under 35 U.S.C. 371(b). Thus, a period of adjustment of patent term due to examination delay starts from the day after the date that is three years after the date on which the requirements of 35 U.S.C. 371 were fulfilled (i.e. July 17, 2006), and ends on the date a patent was issued, excluding any time consumed by (i) continued

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examination of the application under 35 U.S.C. 132(b); (ii) an interference proceeding under 35 U.S.C. 135(a); (iii) imposition of a secrecy order under 35 U.S.C. 181; (iv) review by the Board of Patent Appeals and Interferences or a Federal court; or (v) any delay in the processing of the application by the Office that was requested by the applicant.

A Request for Continued Examination under 35 U.S.C. 132(b) was filed on October 26, 2007. Hence, Applicant submits that the period between July 17, 2006 and October 26, 2007 should be counted as USPTO delay under 37 CFR § 1.702(b). Accordingly, a period of adjustment of patent term due to examination delay starts from the day after the date that is three years after the date on which the requirements of 35 U.S.C. 371 were fulfilled (i.e. July 17, 2006) and ends on October 25, 2007, totaling 466 days.

C. Applicant's Delay Under 37 CFR §1.704(b)

Applicant has taken more than three months to respond to an office action. The period of adjustment set forth in 37 CFR § 1.703 shall be reduced by the number of days beginning on the day after the date that is three months after the date of mailing of an Office communication notifying the Applicant of the rejection (i.e. March 18, 2005) and ending on the date the reply was filed (i.e. March 31, 2005), totaling 14 days.

D. Applicant's Delay Under 37 CFR §1.704(c)(8)

The period of adjustment set forth in 37 CFR § 1.703 shall be reduced by the number of days beginning on the day after the date an initial reply was filed (i.e. April 1, 2005) and ending on the

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date that a subsequent Information Disclosure Statement was filed (i.e. May 16, 2005), totaling 46 days.

E. Applicant's Delay Under 37 CFR §1.704(b)

Applicant has taken more than three months to respond to an office action. The period of adjustment set forth in 37 CFR § 1.703 shall be reduced by the number of days beginning on the day after the date that is three months after the date of mailing of an Office communication notifying the Applicant of the rejection (i.e. October 14, 2005) and ending on the date the reply was filed (i.e. December 12, 2005), totaling 60 days.

F. Applicant's Delay Under 37 CFR §1.704(c)(8)

The period of adjustment set forth in 37 CFR § 1.703 shall be reduced by the number of days beginning on the day after the date an initial reply was filed (i.e. December 13, 2005) and ending on the date that a subsequent Information Disclosure Statement was filed (i.e. January 11, 2006), totaling 30 days.

G. Applicant's Delay Under 37 CFR §1.704(b)

Applicant has taken more than three months to respond to an office action. The period of adjustment set forth in 37 CFR § 1.703 shall be reduced by the number of days beginning on the day after the date that is three months after the date of mailing of an Office communication notifying the Applicant of the rejection (i.e. June 7, 2006) and ending on the date the reply was filed (i.e. September 7, 2006), totaling 93 days.

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H. Applicant's Delay Under 37 CFR §1.704(b)

Applicant has taken more than three months to respond to an office action. The period of adjustment set forth in 37 CFR § 1.703 shall be reduced by the number of days beginning on the day after the date that is three months after the date of mailing of an Office communication notifying the Applicant of the rejection (i.e. April 5, 2007) and ending on the date the reply was filed (i.e. June 4, 2007), totaling 61 days.

I. Applicant's Delay Under 37 CFR §1.704(c)

The period of adjustment set forth in 37 CFR § 1.703 shall be reduced by the number of days beginning on the day after the date an initial reply was filed (i.e. November 6, 2007) and ending on the date that a subsequent Information Disclosure Statement was filed (i.e. December 17, 2007), totaling 41 days.

J. Applicant's Delay Under 37 CFR §1.704(c)(10)

The period of adjustment set forth in 37 CFR § 1.703 shall be reduced by the number of days beginning on the day the amendment under §1.312 or other paper was filed (i.e. June 6, 2008) and ending on the mailing date of the Office Action or Notice in response to the amendment under §1.312 (i.e. September 22, 2008), totaling 109 days.

The sum of the above Applicant's delays total 454 days.

Terminal Disclaimer

Applicant submits that the present application is not subject to a terminal disclaimer.

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Concluding Remarks

In view of the above calculation, Applicant submits that there is a USPTO delay of 558 days, and Applicant delay of 454 days, resulting in a patent term adjustment of 104 days. Applicant herewith notes that pursuant to the Memorandum opinion by Judge James Robertson in *Wyeth et al. v. Dudas*, Civil Action No. 2007-1492(D.D.C. September 30, 2008)(mem.), the calculation of 104 days is justified. The Wyeth case states that the only way that periods of delay under 35 U.S.C. §154(b)(1)(A) and §154(b)(1)(B) can overlap is if they occur on the same days. Applicant submits that both periods of USPTO delay (the 92 and 466 days delay) do not fall on the same days and therefore should be counted in a cumulative fashion.

If a telephone interview would be of assistance in rectifying the patent term adjustment of the subject application, Applicant's undersigned attorney invites the Examiner to telephone him at the number provided below. If any additional fee is required, authorization is hereby given to charge the amount of any such fee to Deposit Account No. 50-1891.

Respectfully submitted,

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